

MEDIATING DIVORCES

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INTRODUCTION

In The Hague, there is an elegant hotel with a white façade and a striped yellow awning. It sits on well-manicured grounds among tall trees. Yet, it is no ordinary hotel—it is the “Divorce Hotel,” where couples check-in married and check-out divorced after a weekend of mediation.¹ Similar mediation businesses have flourished across the United States,² although courts continue to provide some oversight.³

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¹ Janet Morrissey, *Quick Getaways, at the Divorce Hotel*, THE NEW YORK TIMES (May 26, 2012), <https://www.nytimes.com/2012/05/27/business/the-divorce-hotel-a-true-weekend-getaway.html> [https://perma.cc/6M7T-Q82Z].

² See, e.g., *Inside the 'Divorce Hotel'*, CNBC (April 10, 2015), <https://www.cnbc.com/video/2015/04/10/inside-the-divorce-hotel.html> [https://perma.cc/99BL-ZSWS]. See also *infra* Parts I & II.

³ See generally Margaret Ryznar & Angélique Devaux, *Voilà! Taking the Judge Out of Divorce*, 42 SEATTLE U. L. REV. 161 (2018). American judges have been involved in divorce since the earliest cases. *Id.* at 161-62.

Mediation enables couples to settle their divorce according to their own terms with the help of a mediator.⁴ Various forms of mediation have developed to deal with divorce cases, such as shuttle mediation or online mediation to maintain physical separation from abusive spouses.⁵

Several states now either mandate or encourage mediation for resolving property, support, and custody issues.⁶ As a result, mediation has become so commonplace that it has changed how families separate.⁷ With this increased reliance on mediation,⁸ data continues to be useful to evaluate many of the current theories on mediation.

This Article offers original data on mediation in a set of Indiana divorces⁹ and is situated within the literature on mediation.¹⁰ Part I begins by reviewing the literature on mediation and its effectiveness. Part II surveys the Indiana family law defaults against which the mediations in this study occur. Finally,

⁴ “Most divorcing parties themselves settle the financial issues incident to dissolution. They then present their agreement to the court for approval. The rules governing property division and spousal and child support thus establish the framework within which such private ordering takes place.” D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 679 (6th ed. 2016). See Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S7 (1989). See also *infra* Parts I & II.

⁵ See Fernanda S. Rossi et al., *Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence or Abuse*, 55 FAM. CT. REV. 390 (2017).

⁶ Rachel Rebouché, *A Case Against Collaboration*, 76 MD. L. REV. 547, 554-55 (2017). For a description of divorce mediators as scribes in several states, see Robert Kirkman Collins, *The Scribe's Dilemma in Divorce Mediation: Promulgating Progressive Professional Parameters*, 17 CARDOZO J. CONFLICT RESOL. 691 (2016).

⁷ Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce*, 43 WAKE FOREST L. REV. 441, 468-69 (2008).

⁸ “The use of mediation in divorce and related child access disputes is relatively established but has grown exponentially as court-mandated family mediation has spread in the new family courts.” Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 905 (2010).

⁹ See *infra* Part III.

¹⁰ For example, the literature reports that mediators can be effective in the divorce process, including a number of studies in the 1990s and early 2000s that concluded that mediation is helpful. See *infra* Part II. See also Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3 (2004); but see Lori Anne Shaw, *Divorce Mediation Outcome Research: A Meta-Analysis*, 27 CONFLICT RESOL. Q. 447, 448 (2010) (finding some areas of dissatisfaction with mediation when compared to litigation).

Part III presents and examines empirical data on mediation outcomes in a small set of divorce cases from Marion County, Indiana.

I. MEDIATION IN FAMILY LAW

Many empirical studies have been conducted on mediation to date. These studies have examined topics ranging from its effectiveness to the impact of intimate partner violence (“IPV”).

A. Mediation Framework

Mediation is a process for resolving disputes that allows parties, with the help of a mediator, to come to an agreement on contested issues. Mediation intends to open communication between divorcing spouses and allows parties to explore all settlement options in order to resolve disputes.¹¹

The mediator must remain neutral and unbiased.¹² In some states, mediators do not need to be lawyers¹³ and the field may be unregulated.¹⁴ An attorney might not attend mediation sessions, but instead advise a client outside of these sessions.¹⁵

The mediator may start the process by defining and describing the process of mediation.¹⁶ From there, the mediator may guide the parties to define the issues involved in the dispute, then perhaps elicit the information and options needed to help the parties understand each other’s needs.¹⁷ In some complex cases, a collaborative method can be used in which the attorney or other

¹¹ Feinberg, *supra* note 4, at S6-S12.

¹² *Id.* at S29; *see also* Bernie Mayer, *What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate*, 2011 Edition, 95 MARQ. L. REV. 859 (2012).

¹³ IND. CODE § 33-23-3-3 (West 2019); *Rule 2.5: Qualifications of Mediators*, 4B IND. PRAC. RULES ON ADR ANN RULE 2.5.

¹⁴ *See* Art Hinshaw, *Regulating Mediators*, 21 HARV. NEGOT. L. REV. 163 (2016).

¹⁵ Kenneth Cloke et al., *The attorney’s role in divorce mediation*, 1 ALT. DISPUTE RES. PRAC. GUIDE § 31:6 (2018).

¹⁶ *Preamble, standards and commentary*, 15 IND. PRAC., FAMILY LAW § 16:24.

¹⁷ *Structure of task-focused mediation*, 15 IND. PRAC., FAMILY LAW § 16:17; *see also* Anju D. Jessani, *Representing Your Client During the Divorce Mediation Process*, 24 AM. JOURNAL OF FAMILY LAW 189 (2010).

experts are brought into the mediation sessions.¹⁸ Mediation in family law may help people work on an agreement regarding many issues, such as the division of their assets and debts, maintenance, and child-related matters such as child custody and a parenting plan.¹⁹

Mediation is used to settle divorce cases either when the parties elect to mediate their dispute or when it is ordered by the court.²⁰ A number of states have required mediation in family law cases.²¹ In some of these states, mediation is mandatory for at least one type of family law dispute.²² However, even in jurisdictions where mediation is required, there may be opt-out provisions and exceptions for certain situations.²³

¹⁸ Jessani, *supra* note 17, at 192.

¹⁹ See, e.g., Mediation Requirements, *50 State Statutory Surveys: Family Law: Divorce and Dissolution*, Westlaw (database updated May 2018) [hereinafter *50 State Statutory Surveys*] (“The use of mediation as a means for alternative dispute resolution of divorce, dissolution, custody and visitation cases has received widespread attention from legislators, judges, attorneys and mental health professionals. Research suggests that in many cases, mediation may be the more satisfactory and desirable means of conflict resolution than litigation in many of these cases.”).

²⁰ *Selection of Mediators*, IND. ADR RULE 2.4 (2019).

²¹ “To this end, many states now require parties in family disputes to attempt at least one mediation session before proceeding to trial. The policy behind mandatory mediation deserves praise; studies demonstrate that mediation often does an excellent job of alleviating the angst of family litigation. Indeed, mediation has proven to be a powerful tool for lawyers to protect their clients from financial strains and emotional trauma. As mediators assist divorcing parties to communicate and act civilly with one another, the process empowers the parties by allowing them to determine the outcome of their dispute.” Thomas Luchs, *Is Your Client a Good Candidate for Mediation? Screen Early, Screen Often, and Screen for Domestic Violence*, 28 J. AM. ACAD. MATRIM. LAW. 455, 455 (2016).

²² For a detailed table, updated in 2018, with listings for each state, see *50 State Statutory Surveys*, *supra* note 19 (surveying state mediation requirements).

²³ A recent empirical study found no difference among practitioners between mandatory and voluntary mediation programs in terms of their confidence and perceptions of fairness related to the mediation. Shahla F. Ali, *Practitioners’ Perception of Court-Connected Mediation in Five Regions: An Empirical Study*, 51 VAND. J. TRANSNAT’L L. 997, 1024 (2018). For a discussion of the factors that courts should consider in referral practice and design of mediation programs, see Dorcas Quek Anderson et al., *How Should the Courts Know Whether a Dispute is Ready and Suitable for Mediation? An Empirical Analysis of the Singapore Courts’ Referral of Civil Disputes to Mediation*, 23 HARV. NEGOT. L. REV. 265 (2018).

Mediation is not yet required in Indiana divorces,²⁴ but Indiana Code 31-15-9.4-1 states, “Whenever the court issues an order...the court shall determine whether the proceeding should be referred to mediation. In making this determination, the court shall consider: (1) the ability of the parties to pay for the mediation services; and (2) whether mediation is appropriate in helping the parties resolve their disputes.” However, some Indiana counties may require mediation.²⁵ Indiana case law elaborates on family law mediation in the state.²⁶

There is not a uniform public mediation program available throughout Indiana. Financial assistance for mediation is available on a county-by-county basis,²⁷ with specific requirements that counties must follow in setting up a fund to pay for mediation costs.²⁸ Alternatively, litigants can seek the assistance of pro bono

²⁴ *But see* Fuchs v. Martin, 845 N.E.2d 1038, 1041-42 (Ind. 2006) (holding that “trial courts and local court rules *may* require parties to engage in mediation as a prerequisite to contested court trials or hearings”) (emphasis added).

²⁵ IND. CODE 33-23-6-2(f) (West 2019); *Case Selection/Objection*, IND. ADR RULE 2.2; *Local Rules*, INDIANA JUDICIAL BRANCH, <http://www.in.gov/judiciary/2694.htm> [<https://perma.cc/QD9B-Q2XF>]; *Historical Background*, 15 Ind. Prac. Fam. L. § 16:1.

²⁶ *See, e.g.*, Stone v. Stone, 991 N.E.2d 992, 1001 (Ind. Ct. App. 2013) (“[D]issolution settlement agreements dealing with property and maintenance issues generally should be upheld unless there is *Gabriel*-type evidence of fraud, coercion, or manifest inequity [However, in custody agreements the] ‘overriding policy concern’ is the best interests of the child”); Fackler v. Powell, 891 N.E.2d 1091, 1097 (Ind. Ct. App. 2008) (noting that extrinsic evidence from the mediator was inadmissible); Spencer v. Spencer, 752 N.E.2d 661, 664-65 (Ind. Ct. App. 2001) (holding that the mediated settlement was not binding until the wife had a chance to review and sign the written agreement and it was approved by the trial court). *See also* K.L. v. E.H., 6 N.E.3d 1021, 1031, 1034 (Ind. Ct. App. 2014) (holding that the trial court did not abuse its discretion in excluding admission of testimony from the mediator after “[t]he court stressed several times that it would not entertain any testimony by the counselor and that Indiana’s policy strongly favors confidentiality of all matters that occur during mediation”); Glover v. Torrence, 723 N.E.2d 924, 933 (Ind. Ct. App. 2000) (holding that the former husband’s misrepresentation of his income during mediation amounted to intrinsic fraud rather than extrinsic fraud because the former wife could have easily verified his income, but instead took him at his word).

²⁷ *Mediation/Alternative Dispute Resolution*, INDIANA JUDICIAL BRANCH, <https://www.in.gov/judiciary/selfservice/2360.htm> [<https://perma.cc/AE3S-DTCT>]; *ADR Program Basics*, INDIANA JUDICIAL BRANCH, <http://www.in.gov/judiciary/adr/2372.htm> [<https://perma.cc/AS6C-FNKB>].

²⁸ IND. CODE §§ 33-23-6-1, 33-23-6-2, 33-23-6-3 (West 2019).

mediators searchable via an online database.²⁹ The court may set the mediation rate and determine the division of the cost between the parties.³⁰

As technology advances, online mediation services have become available. For example, the *Up to Parents* website guides parents through custody and parenting time issues.³¹ Parents visit the website separately and, when they are both finished with the interactive section, receive personalized commitments.³²

Mediation can be used in almost any type of dispute, but it is particularly well-suited for family law cases. Divorce can be stressful, and mediation allows for a more collaborative and amicable divorce process.³³ Mediation also gives parties more control over the outcome of their case.³⁴ By alleviating reliance on the court system, mediation can save public resources. Mediation can even hasten the divorce process and facilitate buy-in by the parties, making them more likely to fulfill their obligations. Kenneth J. Rigby has identified eighteen separate advantages to divorce mediation.³⁵ The earlier in the legal process that mediation begins, the more the client may benefit.³⁶

However, there are also potential disadvantages to mediation, such as unequal bargaining power if one of the parties is overpowering or abusive.³⁷ This is particularly true when a person

²⁹ Find a Registered Mediator, INDIANA JUDICIAL BRANCH, <https://courtapps.in.gov/mediatorsearch> [<https://perma.cc/HRG6-5QPE>].

³⁰ *Mediation Costs*, IND. ADR RULE 2.6.

³¹ UP TO PARENTS, <https://www.uptoparents.org/> [<https://perma.cc/Z43C-9G4Y>].

³² St. Joseph County in Indiana has required parties to use this website and provide the court with verification of completing its worksheets. *Websites Available for Parents*, 15 IND. PRAC., FAMILY LAW § 16:2.

³³ M. Katherine Kerbs, Comment, *Robbing the Cradle: The Use of Mediation in Parental Rights Termination with Evidence of Drug Abuse by the Mother*, 2016 J. DISP. RESOL. 217, 222 (2016).

³⁴ Feinberg, *supra* note 4, at S6-S7.

³⁵ Kenneth J. Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1744-45 (1984).

³⁶ Kenneth Cloke et al., *Encouraging the client to mediate*, 1 ALT. DISPUTE RES. PRAC. GUIDE § 31:3 (2018).

³⁷ Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L.J. 241, 245-46 (2001).

seeks a divorce from an abusive spouse, who may need oversight from a court during the divorce.³⁸

Divorce mediators face a number of issues.³⁹ For example, mediators need to be aware of the challenges presented by IPV. They should properly screen for this concern then navigate those findings to reach the best outcome for the parties.⁴⁰

Mediators must also abide by the rules of confidentiality and admissibility. For the most part, communications that occur during mediation are confidential.⁴¹

Pro se parties can also pose a challenge for mediators who are not licensed attorneys because they must be careful not to provide legal advice or file documents for self-represented parties.⁴² The mediator's role is to balance the negotiating power between the parties so that they may both participate equally in the negotiation.⁴³ This balancing act is typically made more difficult when one party is represented and the other is not.

One issue for pro se clients is that they may not always know the legal consequences of marriage.⁴⁴ Over the last few decades, a

³⁸ See Dafna Lavi, *Till Death Do Us Part?!: Online Mediation as an Answer to Divorce Cases Involving Violence*, 16 N.C. J. L. & TECH. 253, 263-72 (2015).

³⁹ See, e.g., STEPHEN B. GOLDBERG ET AL., HOW MEDIATION WORKS: THEORY, RESEARCH, AND PRACTICE (2017).

⁴⁰ Connie J. A. Beck et al., *Divorce Mediation With and Without Legal Representation: A Focus on Intimate Partner Violence and Abuse*, 48 FAM. CT. REV. 631, 633 (2010); *Mediation Procedure*, IND. ADR RULE 2.7.

⁴¹ *Compromise Offers and Negotiations*, IND. EVID. R. 408; *Rules of Evidence*, IND. ADR RULE 2.8; *Discovery*, IND. ADR RULE 2.9; *Confidentiality and Admissibility*, IND. ADR RULE 2.11; see also Horner v. Carter, 981 N.E.2d 1210, 1211-13 (Ind. 2013); K.L. v. E.H., 6 N.E.3d 1021, 1030-31 (Ind. Ct. App. 2014); Fackler v. Powell, 891 N.E.2d 1091, 1096-97 (Ind. Ct. App. 2008); Marchal v. Craig, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997).

⁴² See Amy G. Applegate & Connie J.A. Beck, *Self-Represented Parties In Mediation: Fifty Years Later It Remains The Elephant In The Room*, 51 FAM. CT. REV. 87 (2013).

⁴³ Kenneth Cloke et al., *Power-balancing*, 1 ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 31:5 (2018).

⁴⁴ See, e.g., Iowa Legal Aid, *Common Myths About Family Law*, IOWA LEGAL AID (March 8, 2013), <https://www.iowalegalaid.org/resource/common-myths-about-family-law?ref=3lwed> [https://perma.cc/7UB5-BLBH]; see also Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1860 (2005) (noting that family law is currently in the domain of the states but this has not always been the case); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 789 (2015); but see Libby S. Adler, *Federalism and*

number of studies have suggested that the public's understanding of the law is subject to a substantial knowledge deficit.⁴⁵ One study identified a low level of family law knowledge possessed by residents of the United Kingdom regarding marriage and cohabitation rights.⁴⁶ Many Americans similarly have erroneous beliefs.⁴⁷ For example, there are many misunderstandings of community property and its consequences.⁴⁸ People may also not understand the differences between owning property in joint tenancy, tenancy in common, or trust.⁴⁹ In sum, the average person does not necessarily have an accurate understanding of family law, which is a concern for pro se clients.⁵⁰

There are also misconceptions about mediation that prevent people from trying it. These include the beliefs that the legal profession objects to mediation, parties cannot choose their own mediator, the mediator will try to reunite the couple or save the marriage, and the courtroom will be the best place to fight to win.⁵¹ Of course, mediation may be inappropriate in certain situations, such as if a party is incapacitated, there has been IPV, a party

Family, 8 COLUM. J. GENDER & L. 197, 199-200 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain).

⁴⁵ Pascoe Pleasence & Nigel J. Balmer, *Ignorance in Bliss: Modeling Knowledge of Rights in Marriage and Cohabitation*, 46 LAW & SOC'Y REV. 297, 297 (2012) (citing several studies of lack of family law knowledge). "[P]eople may rely on legal authority when they know little or nothing about the formal rules." Anna-Maria Marshall & Scott Barclay, *In Their Own Words: How Ordinary People Construct the Legal World*, 28 LAW & SOC. INQUIRY 617, 621 (2003). "In some circumstances, people reasonably look to social cues to understand what the law requires of them." Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035, 1082 (2013).

⁴⁶ Pleasence & Balmer, *supra* note 45, at 298.

⁴⁷ See, e.g., Joanne Hughes Burkett, *Myths About Marriage & Divorce in South Carolina*, 17 S.C. LAW. 14 (2005).

⁴⁸ Inna Pullin, *An Illinois Lawyer's Guide to Community Property*, 97 ILL. B.J. 360 (2009).

⁴⁹ Robert S. Hunter, *Bequests of property not owned by the testator*, 19 ILL. PRAC., ESTATE PLANNING & ADMIN. § 183:18 (4th ed. 2018).

⁵⁰ See Ritchie Eppink, *Are We Missing Something? Public Legal Health*, 52 ADVOCATE 28 (2009); see also Rowland S. Miller, *Confusion and Consternation, Misperceptions and Misconceptions on the Public's Misunderstanding of the Law*, 40 S. TEX. L. REV. 973 (1999).

⁵¹ Joanne Naiman, *Eight Myths of Divorce Mediation*, HUFFINGTON POST (March 4, 2011, 11:09 AM), https://www.huffingtonpost.com/joanne-naiman/divorce-mediation-myths_b_831334.html [<https://perma.cc/P93A-2U9K>].

believes the other is hiding assets, or either party is unwilling to mediate.⁵²

B. Mediation Effectiveness

To date, a number of empirical studies have been conducted on mediation. These studies focus on mediation effectiveness, the impact of IPV, mediator styles, pro se clients, and other factors affecting final agreement rates.

Several studies from the 1990s found that mediation in family law cases resulted in better satisfaction and outcomes for parties than litigation.⁵³ For instance, people may be more likely to adhere to mediated resolutions than orders litigated in an adversarial forum.⁵⁴ However, other studies do not show much difference between mediated and non-mediated divorces.⁵⁵ For example, research did not find differences between mediated and non-

⁵² Joe Dillon, *Divorce Mediation vs Divorce Lawyer: Which is Right for You?*, EQUITABLE MEDIATION, <https://www.equitablemediation.com/blog/divorce-mediator-vs-lawyer> [<https://perma.cc/7Z3K-JPVX>] (last accessed Sept. 24, 2019).

⁵³ Some empirical research has found that in mediation settlement rates are higher and that children have better relationships with non-residential parents over the long term. See, e.g., Robert E. Emery et al., *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 26, 30-32 (2005) (finding such results twelve years after mediation occurred); Rebouché, *supra* note 6, at 555 n.32; see also Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1320 (1995) (“Mediation proponents respond that mandatory mediation can produce results as fair as or more fair than those achieved through a traditional divorce system, and they praise mediation’s benefits as compared to litigation.”).

⁵⁴ Janet A. Flaccus, *Mediation of Divorce Disputes – Is This the Solution?*, 2009 ARK. L. NOTES 79, 80 (2009).

⁵⁵ Bernard Mayer, Joseph B. Stulberg & Lawrence Susskind, *Core Values of Dispute Resolution: Is Neutrality Necessary?*, 95 MARQ. L. REV. 805, 819-820 (2012) (“[T]here’s a fair amount of data that shows that mediated outcomes, for example, don’t necessarily differ in great degree from non-mediated outcomes in divorce. There may be more buy-in and greater nuance in the agreements; but it’s not that the outcome itself is what’s so different, it is the sense people have of ownership of the outcome and, maybe, the sense people have of putting some of their individual stamps on it. I also think we’ve been far too focused on outcomes. I think we have not delivered on this, and that’s one of the problems we face with our credibility. We’ve said, *Hey we’ve got a process for you: we’re going to get everybody together, we’re going to come up with terrific outcomes that are going to be fair, efficient, stable, and wise, and we will all be happy about that*—and we haven’t delivered. But I think what we can offer is a process that promotes a constructive engagement about key issues.”) (emphasis in original).

mediated processes with regard to the psychological health of either party or an improvement in the relationship between ex-spouses.⁵⁶

A notable amount of research has focused on IPV in recent years. Some of these studies seek to determine the best screening techniques for IPV and also whether IPV is a barrier to effective mediation. One study found that there are lower settlement rates in cases where one or more indicators of IPV are present, “although not all types of aggression or violence had an equal impact on settlement.”⁵⁷ The same study found that “[t]here were no large impacts on party satisfaction due to the presence of IPV/A and the vast majority of parties felt safe in the mediation process.”⁵⁸ “However, in those cases where multiple risk factors were present or where the parties indicated they were very afraid or terrified of the other party prior to the commencement of mediation, these cases had a relatively low chance of settlement.”⁵⁹ Another study found that IPV might determine the content of the settlement agreement,⁶⁰ which shows the importance of screening for IPV.

A number of studies have also sought to analyze the various mediation styles employed by mediators during the negotiation process, such as evaluative or facilitative mediation.⁶¹ There are advantages to each.⁶² One author has proposed a type of evaluative mediation that is a hybrid child custody mediation model, in which

⁵⁶ Emery, *supra* note 53, at 30-32.

⁵⁷ Susan Raines et al., *Safety, Satisfaction, and Settlement in Domestic Relations Mediations: New Findings*, 54 FAM. CT. REV. 603, 617 (2016).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Fernanda S. Rossi et al., *Does Level of Intimate Partner Violence and Abuse Predict the Content of Family Mediation Agreements?*, 53 FAM. CT. REV. 134, 149-152 (2015). “[S]ome findings were consistent with concerns raised about the use of mediation with parties reporting IPV and IPV/A; for example, increasing levels of male-perpetrated IPV/A predicted increased likelihood of making an agreement to share legal custody.” *Id.* at 134.

⁶¹ Kenneth Kressel, *How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking*, 28 OHIO ST. J. ON DISP. RESOL. 709, 718 (2013); but see Rachid Baitar et al., *Exploring Helpful Tensions between Divorce Mediators and Clients: A Relational Dialectical Analysis*, 34 CONFLICT RESOL. Q. 7, 9 (2016).

⁶² For example, health professionals might be more likely to use one style over the other. Rachid Baitar et al., *Styles and Goals: Clarifying the Professional Identity of Divorce Mediation*, 31 CONFLICT RESOL. Q. 57, 66 (2013).

the mediator not only facilitates the negotiations regarding custody, but also proposes options to resolve the case.⁶³

Another area of empirical research examines the differences between pro se and represented clients. When one party is represented by a lawyer and the other is not, parties may have more concerns before the mediation and lower satisfaction after the mediation.⁶⁴

Research has also found that certain factors affect the likelihood of an agreement being reached by the parties through mediation. Agreements were less likely to be reached in cases where there were greater interparental conflicts, case complexities, attorney representation, more mediation sessions, or higher levels of father's income.⁶⁵

Finally, mediation that focuses on the parties' children or involves the children directly has shown some promising results. People that participated in child-focused or child-involved mediation had fewer motions, hearings, and orders in the following year.⁶⁶ Additionally, the resulting mediation agreements were more likely to include aspirational language about co-parental communication; parental agreement not to disparage, insult, or fight each other; and more child-related rationales for the agreement.⁶⁷

II. FAMILY LAW DEFAULTS

Mediation does not occur in a vacuum, but within legal framework defaults. Every family member is governed by family law, whether a spouse, parent, or child.⁶⁸ Family law is rooted in

⁶³ Daniel B. Pickar, *Intermittent Evaluative Mediation With Enduring, Postdivorce Conflict*, 8 J. OF CHILD CUSTODY 143, 146 (2011).

⁶⁴ Michael M. Pettersen et al., *Representation Disparities and Impartiality: An Empirical Analysis of Party Perception of Fear, Preparation, and Satisfaction in Divorce Mediation When Only One Party Has Counsel*, 48 FAM. CT. REV. 663, 667 (2010).

⁶⁵ Robin H. Ballard et al., *Factors Affecting the Outcome of Divorce and Paternity Mediations*, 49 FAM. CT. REV. 16, 27 (2011).

⁶⁶ Brittany N. Rudd et al., *Child-Informed Mediation Study Follow-Up: Comparing the Frequency of Relitigation Following Different Types of Family Mediation*, 21 PSYCHOL. PUB. POL'Y & L. 452, 455 (2015).

⁶⁷ *Id.* at 453.

⁶⁸ See D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL

society's perceptions of morality, common sense, and prevailing cultural norms.⁶⁹ "Perhaps nowhere is the connection and the tension between the individual and the collective more prominent than in family law."⁷⁰

At the same time, family law has a very practical function, being "generally viewed as a dispute, conflict, and lawsuit practice."⁷¹ "For all its shortcomings, family law provides an institution to help divorcing couples restructure their families following the end of relationships."⁷²

Family law also protects the parties to a marriage and divorce.⁷³ Without family law, some people would not be compelled to support their children.⁷⁴ Others would leave their marriage with all of the marital assets.⁷⁵ Ultimately, the weakest members of the family would go unprotected. The role of family law thus is to protect the individual family members.

Family law intervenes at different stages to protect family members. Although there is state interference with getting married,⁷⁶ there is mostly non-interference during marriage.⁷⁷ That

FAMILY LAW (2003). However, family law is a story of inclusion and exclusion, and certain relationships are excluded from legal recognition while others are included. For example, family law does not extend to cohabitants. Ji Hyun Kim et al., *The Rise of PACS: A New Type of Commitment from the City of Love*, 56 WASHBURN L.J. 69, 72 (2017).

⁶⁹ Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 231 (2019).

⁷⁰ Rebecca Hollander-Blumoff, *Social Value Orientation and the Law*, 59 WM. & MARY L. REV. 475, 510 (2017).

⁷¹ Forrest S. Mosten & Lara Traum, *The Family Lawyer's Role in Preventive Legal and Conflict Wellness*, 55 FAM. CT. REV. 26, 26 (2017).

⁷² Clare Huntington, *Nonmarital Families and the Legal System's Institutional Failures*, 50 FAM. L.Q. 247, 247 (2016).

⁷³ Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. ST. L. REV. 1385, 1402 (2013).

⁷⁴ Jacquelyn L. Boggess, *Low-Income and Never-Married Families: Service and Support at the Intersection of Family Court and Child Support Agency Systems*, 55 FAM. CT. REV. 107, 111-12 (2017).

⁷⁵ Linda D. Elrod & Robert G. Spector, *Review of the Year 2015-2016 in Family Law: Domestic Dockets Stay Busy*, 50 FAM. L.Q. 501, 516 (2017).

⁷⁶ For example, restrictions on who can marry include those based on age, family relation, and procedural requirements. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 837 (2004).

⁷⁷ There is a high level of scrutiny given to laws restricting marital privacy. See, e.g., Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 128-29 (2018). The

changes again, however, upon the divorce of the couple.⁷⁸ When the family unit fails, the state intervenes. And, marriage is no longer devoid of the possibility of divorce.⁷⁹ Divorce implicates family law on both property division and child-related questions.

In regard to property division, the majority of states, including Indiana, are separate property states.⁸⁰ The underlying principle is that, during marriage, property belongs to the spouse who acquired it. There are some exceptions, such as when one spouse gifts property to another or there is commingling.⁸¹ Otherwise, creditors can generally reach only a debtor's separate property.⁸² In these states, therefore, a sole-income spouse may legally own everything during the marriage, but that is not determinative of the divorce property division. Instead, at divorce, the judge divides the property according to what is equitable, or fair, regardless of who earned the property.⁸³ Assets and debts are treated the same.⁸⁴

nonintervention doctrine also prevents courts from adjudicating issues arising in intact marriages. See Elaine M. Chiu, *That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age*, 44 FAM. L.Q. 255, 286 (2010). The doctrine of necessities is an exception, forcing one spouse to provide for the other spouse's necessary expenses. The courts look to the couple's standard of living to determine what qualifies as a necessity. See, e.g., *Connor v. Sw. Fla. Reg'l Med. Ctr., Inc.*, 668 So. 2d 175, 175-76 (Fla. 1995). The duty to support a spouse is a similar exception, compelling one spouse to support the other. Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 12-14 (2003).

⁷⁸ See *supra* Part I.

⁷⁹ See Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1246 (2015) ("First comes marriage; then comes divorce.").

⁸⁰ A minority of states have adopted community property instead, and these states are Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, Washington, and Wisconsin. In these states, spouses automatically own half of everything earned in the marriage. At divorce, the property division can be more equal. See, e.g., Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145, 235 (1998).

⁸¹ Spouses can transmute separate property into marital property by, for example, agreeing to do so, retitling it in both spouses' names, or gifting it to each other. Laura W. Morgan & Edward S. Snyder, *When Title Matters: Transmutation and the Joint Title Gift Presumption*, 18 J. AM. ACAD. MATRIM. LAW. 335, 340-48 (2003).

⁸² See, e.g., James R. Ratner, *Creditor and Debtor Windfalls from Divorce*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 211, 211 (2011) ("One relatively ancient form of protection offered to the non-debtor spouse . . . is the concept of separate property.").

⁸³ See, e.g., Tait, *supra* note 79, at 1248.

⁸⁴ See Margaret M. Mahoney, *The Equitable Distribution of Marital Debts*, 79 UMKC L. REV. 445, 446 (2010). Professor Mahoney "explores the rules governing debt allocation in the common law property states and under the *Principles* as well as the ways they deviate from corresponding rules governing the distribution of assets in divorce

Indiana is relatively unique among these states because all of the couple's assets and debts, even premarital ones, are put into a "marital pot" at divorce and then presumed to be divided equally, which is determined to be equitable.⁸⁵ According to the Indiana family law code, "[t]he court shall presume that an equal division of the marital property between the parties is just and reasonable."⁸⁶ An equal property division can be reached by any arrangement of the property.⁸⁷

There are five factors listed in the Indiana Code that may be presented to the court in order to rebut the presumption of equal property division.⁸⁸ These include each spouse's contributions (including nonfinancial contributions such as childcare), ownership of the property before marriage or through gift or inheritance, the economic circumstances of each spouse after the divorce, the dissipation of property, and the earning ability of the spouses.⁸⁹

In regard to children, state child support guidelines apply to determine the amount of child support.⁹⁰ These provide detailed guidance for parents to calculate their child support.⁹¹ In Indiana, for example, the Child Support Guidelines allow a credit for a certain number of overnights each year that children spend with the noncustodial parent.⁹²

proceedings. Most often, when the debt rules deviate from corresponding property rules, the variation results in *less* judicial authority to 'reassign' responsibility for debts from one spouse to the other, when compared to the courts' authority over assets." *Id.* (emphasis in original).

⁸⁵ IND. CODE § 31-15-7-5 (West 2019).

⁸⁶ *Id.*

⁸⁷ IND. CODE § 31-15-7-4(b) (West 2019).

⁸⁸ IND. CODE § 31-15-7-5 (West 2019).

⁸⁹ *Id.*

⁹⁰ J. Eric Smithburn, *Determination of child support amount*, 14 IND. PRAC., FAMILY LAW § 9:9 (2018).

⁹¹ Tonya L. Brito, *The Child Support Debt Bubble*, 9 UC IRVINE L. REV. 953, 958-960 (2019) (reviewing several formulae for calculating child support).

⁹² Indiana Rules of Court, *Child Support Rules and Guidelines*, Guideline 6, available at https://www.in.gov/judiciary/rules/child_support/#g6 [<https://perma.cc/VES9-FNFM>].

Family law also seeks to protect the parent-child relationship following the divorce.⁹³ Accordingly, there has been a move across the country toward shared custody between parents and away from the former presumption in favor of the mother as the sole custodian.⁹⁴

This illustrates another goal in child-related matters—the child’s best interests.⁹⁵ “[F]amily law, at its core, tries to position children for success and redress unfairness within families.”⁹⁶ Courts, including in Indiana, consider the child’s best interests in making several child-related determinations, such as child custody and visitation.⁹⁷ The wishes of children, especially if they are older, often play a role in these considerations.⁹⁸

In 2001, the Indiana Supreme Court adopted the Parenting Time Guidelines to help determine visitation.⁹⁹ These Guidelines represent the minimum recommended time that a parent should have to maintain frequent, meaningful, and continuing contact with a child.¹⁰⁰ The amount of time provided by the Indiana

⁹³ See Alison Gash & Judith Raikin, *Parenting without Protection: How Legal Status Ambiguity Affects Lesbian and Gay Parenthood*, 43 LAW & SOC. INQUIRY 82, 88 (2018) (describing second parent adoption).

⁹⁴ See Daniel R. Meyer et al., *The Growth in Shared Custody in the United States: Patterns and Implications*, 55 FAM. CT. REV. 500, 505 (2017) (documenting the dramatic decline in the United States of sole custody arrangements).

⁹⁵ See Jana B. Singer, *Bargaining in the Shadow of the Best-Interests Standard: The Close Connection Between Substance and Process in Resolving Divorce-Related Parenting Disputes*, 77 L. & CONTEMP. PROBS. 177, 179-80 (2014).

⁹⁶ Merle H. Weiner, *Family Law for the Future: An Introduction to Merle H. Weiner's A Parent-Partner Status for American Family Law* (Cambridge University Press 2015), 50 FAM. L.Q. 327, 328 (2016).

⁹⁷ See, e.g., IND. CODE § 31-17-2-8 (West 2019).

⁹⁸ See, e.g., IND. CODE § 31-17-2-8(3) (West 2019).

⁹⁹ See, e.g., Julie E. Artis & Andrew V. Krebs, *Family Law and Social Change: Judicial Views of Joint Custody, 1998-2011*, 40 LAW & SOC. INQUIRY 723, 728 (2015).

¹⁰⁰ INDIANA PARENTING TIME GUIDELINES § 2 (DOMESTIC RELATIONS COMM. 2013) [hereinafter INDIANA PARENTING TIME GUIDELINES]. “In 2008, the Division of State Court Administration printed 75,000 copies of the Indiana Parenting Time Guidelines in booklet format for distribution to trial courts with domestic relations jurisdiction.” Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607, 614 (2010).

Parenting Time Guidelines is presumptively correct,¹⁰¹ but both courts and parents can deviate from these Guidelines.¹⁰²

Thus, the Indiana legal framework has a relative inclination toward equal property division and shared parenting. It is against these legal defaults that mediation occurs. The next Part undertakes the task of analyzing a set of mediation outcomes in Indiana.

III. EMPIRICAL RESULTS

This study provides an analysis of mediation outcomes in a sample of divorces from one county in Indiana. The results may be useful for policymakers and lawmakers, as well as couples considering their options related to divorce mediation.

A. Data

The data is from divorce records that are public, but ensures that individual records are kept confidential. These records consist of case files from accessible 2008 divorces in Marion County involving minor children. The information coded comes from complaints and answers (or motions and responses), reports by child coordinators, completed parental worksheets for child support, parenting plans (joint or sole), and final dissolution orders (or orders dealing with motions or protective orders). Case files were coded for multiple variables, including who filed for the divorce, who received the marital home, how the pension was divided, who received custody of the children, and how parenting time was divided in each case—in addition to being coded for the use of a private mediator.

The data consisted of 109 divorces. Of these, 24 divorcing couples engaged a private mediator at some point in their case (22%).

¹⁰¹ INDIANA PARENTING TIME GUIDELINES, *supra* note 100, *Guidelines* (C)(3).

¹⁰² *See, e.g.,* Shady v. Shady, 858 N.E.2d 128, 143 (Ind. Ct. App. 2006) (affirming the trial court's determination that a deviation from the Parenting Time Guidelines was warranted given a risk of abduction and potential harm); INDIANA PARENTING TIME GUIDELINES, *supra* note 100, *Guidelines* (C)(3).

In the 24 cases where a mediator was involved, 22 fathers paid child support (92%). The average amount of child support ordered in these cases that had data available was \$136.

Meanwhile, in the 85 cases that had no mediator, 65 fathers paid child support (76%). The average amount of child support ordered in these cases that had data available was \$113.

In the 24 mediated cases, the mother had primary custody in 19 cases (79%). Also, in the 24 mediated cases, there was a parenting time adjustment in 20 cases (83%), meaning that there was sufficient parenting time by the noncustodial parent to allow a reduction in child support. The average parenting time was 101 days per year in all the mediated cases where there was such data available. None of the mediated cases had a supervised or other restriction on visitation.

In contrast, in the 85 non-mediated cases, the mother had primary custody in 57 cases (67%). Also, in the 85 non-mediated cases, there was a parenting time adjustment in 60 cases (71%). The average parenting time was 69 days per year in all the non-mediated cases where there was such data available. Eight of the non-mediated cases had a supervised or other restriction on visitation.

B. Analysis

This data suggests that there may be more equal outcomes between divorcing spouses along certain measures when a mediator is involved. In this sample of cases, when a mediator was involved, child support was more commonly paid and the non-custodial parent received more parenting time. However, fathers were less likely to have primary custody of their children.

These outcomes may be due to correlation—couples engaging in mediation may be friendlier with each other, and therefore more likely to share parental and financial duties. Furthermore, couples engaging in mediation could be wealthier and have more resources to commit to resolving their divorces amicably and fulfilling the resulting obligations.

However, causation is also a possible explanation for the data.¹⁰³ For example, a mediator may try to get the spouses to equal outcomes given that this is where the Indiana code begins. Guidelines may help parties arrive at a settlement, with predictability and consistency gained by legislative formulae. On the other hand, family law formulae have their limits because the facts vary among divorce cases.

If it is true that mediated divorce cases have a better likelihood of more equal outcomes, then mediation seems to be in the spirit of the states that value equal outcomes between divorcing spouses, such as Indiana.¹⁰⁴ Indeed, family law has been aiming for equality between the spouses at divorce, both in terms of property division and child-related matters.¹⁰⁵ For example, state statutes have been trending toward equal property division and joint custody.¹⁰⁶ In these states, it would make sense for legislators, judges, and lawyers to encourage mediation in divorce, given the results of this study. Yet, less than a quarter of the divorcing couples in this study's sample engaged a private mediator in their case.

There are advantages to mediation revealed by this study that have larger implications for family law. For example, arrearages in child support are a major issue in the United States today.¹⁰⁷ If non-custodial parents are more likely to pay child support after mediation, then mediation offers an important contribution to decreasing child support arrearages. Furthermore, the involvement of both parents with a child is important¹⁰⁸ and shared parenting

¹⁰³ See, e.g., Lorig Charkoudian et al., *What Works in Custody Mediation? Effectiveness of Various Mediator Behaviors*, 56 FAM. CT. REV. 544 (2018) (examining the impact of mediator behaviors on participant attitudes and case outcomes).

¹⁰⁴ See *supra* Part III.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ For example, approximately 75% of custodial parents who were due child support in 2013 received some child support, but less than half (45%) received full payments owed. Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2013: Current Population Reports*, U.S. CENSUS BUREAU 1 (Jan. 2016), available at <https://www.census.gov/content/dam/Census/library/publications/2016/demo/P60-255.pdf> [<https://perma.cc/Q9NY-KV6E>].

¹⁰⁸ See, e.g., Matthew M. Stevenson et al., *Associations Between Parental Relocation Following Separation in Childhood and Maladjustment in Adolescence and Young Adulthood*, 24 PSYCHOL. PUB. POL'Y & L. 365, 365 (2018) ("Long-distance separation from biological fathers prior to age 12 was linked in adolescence and young adulthood to

has benefits for children.¹⁰⁹ If mediation results in higher parental participation of both parents, then mediation may be a way to achieve the child's best interests.

Of course, mediation may not be suitable for couples who have IPV or other factors that complicate their divorce and may require unequal outcomes. Indeed, several non-mediated cases in this study had a supervised or other restriction on visitation.

The autonomy of spouses in mediation parallels the autonomy in premarital agreements. Mediation is a form of contracting that results in a settlement between the spouses after their marriage ends, while the premarital agreement is a form of contracting before the marriage even begins, particularly in regard to property rights.¹¹⁰ Either way, couples enjoy strong contractual autonomy in the United States.

However, there are certain advantages when couples use their contractual autonomy in a premarital agreement versus mediation. Mediation typically spans several sessions.¹¹¹ By the time the marriage ends, couples may be more emotional and disappointed. Before marriage, in contrast, couples may be more willing to compromise to achieve a balanced agreement. Despite these benefits, few people enter into premarital agreements.¹¹² There may be various reasons for this—chiefly among them that “people are too optimistic to consider their need for one, and engaged couples are concerned that bringing up the idea of a postnuptial agreement will send a distrustful and damaging signal to their

serious behavior problems, anxiety and depression symptoms, and disturbed relationships with all three parental figures (i.e., biological fathers, mothers, and stepfathers).”; Lynn D. Wardle, *Institutionalizing Society's Commitment to Child Well-Being*, 42 S. ILL. U. L.J. 225, 227 (2018) (“The contributions of both mothers and fathers are important for children.”).

¹⁰⁹ See Linda Nielsen, *Divorced Fathers and Their Daughters: A Review of Recent Research*, 52 JOURNAL OF DIVORCE & REMARRIAGE 77 (2011).

¹¹⁰ See *Uniform Premarital and Marital Agreements Act*, 46 FAM. L.Q. 345 (2012). See also Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343 (2015) (examining whether child-related matters can be subject to premarital agreements).

¹¹¹ Jessani, *supra* note 17; Kenneth Cloke et al., *What is family law mediation?*, 1 ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE § 31:2 (2018).

¹¹² “[O]nly five to ten percent of first marriages involve prenuptial agreements.” Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statutes in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 70 (2014).

prospective spouse.”¹¹³ Mediation may not suffer from these issues, but may offer fewer benefits.

In sum, there may be more equal outcomes along some measures with the involvement of a mediator. Such outcomes can help address some of the current issues facing family law, such as child support arrearages.

CONCLUSION

This Article aims to add to the literature on divorce mediation by providing an analysis of a sample of mediation outcomes in Indiana divorces. Specifically, the data shows more equal outcomes between divorcing spouses along certain measures when a mediator was involved.

These findings are important given the prevalence of divorce today.¹¹⁴ Each year, there are more than two million marriages occurring in the United States, and over half a million divorces.¹¹⁵ Although the law generally seeks to help communities by providing structure and justice, family law does so especially. The families

¹¹³ Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 766 (2009); see also Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27 (2009).

¹¹⁴ Even two decades ago, Justice O'Connor observed that there is no longer an average family. See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”); see also *id.* at 98 (Kennedy, J., dissenting) (“For many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood.”). “We are not a marriage population predominantly in practice, and children are not predominantly raised for 18 years by their two parents in a common household.” Katharine Silbaugh, *Distinguishing Households from Families*, 43 FORDHAM URB. L.J. 1071, 1074 (2016).

¹¹⁵ *National marriage and divorce rate trends for 2000-2018*, CTRS. FOR DISEASE CONTROL & PREVENTION: NAT'L CTR. FOR HEALTH STAT., <https://www.cdc.gov/nchs/data/dvs/national-marriage-divorce-rates-00-18.pdf> [<https://perma.cc/J364-9QSN>]. Several Indiana counties have been on the Census Bureau's top 50 list for divorce. Richard Essex, *Indiana Counties Abound in Most Divorces List* (Sept. 2009), available at <http://www.wthr.com/article/indiana-counties-abound-in-most-divorces-list> [<https://perma.cc/7BC9-RT9X>]. “Wayne County in east central Indiana is at the top, with almost 20 percent of couples filing for divorce. Floyd, Madison, Vigo, Vanderburgh, Marion and Clark counties also made the list, more than any other state.” *Id.*

impacted by divorce would therefore benefit from the continued study of divorce mediation.

